Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ESTATE OF ELEANOR R. GERSON, Deceased,
ALLAN D. KLEINMAN, Executor,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514, ambiguous, allowing the Secretary of the Treasury to promulgate and enforce a regulation construing that section in a manner that is at odds with the determinations of two United States Courts of Appeals that the section is plain and unambiguous?

2. May the Secretary of the Treasury ignore the determination of a United States Court of Appeals that the language of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514, is plain and unambiguous, and promulgate an interpretive regulation—Treas. Reg. § 26.2601-1(b)(1)(i)—that is contrary to the court's interpretation?

3. Is Petitioner liable for a deficiency in federal generation-skipping transfer tax in the amount of $1,144,465.00 based upon a holding that Treas. Reg. § 26.2601-1(b)(1)(i) is a reasonable and valid interpretation of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514, when that regulatory provision is contrary to the plain language of the statute?

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OPINIONS BELOW

The October 24, 2006 decision of the United States Tax Court is reported at 127 T.C. 139, and is set out in the appendix at App. 13a.

The November 9, 2007 decision of the United States Court of Appeals for the Sixth Circuit is reported at 507 F.3d 435, and is set out in the appendix at App. 1a.

JURISDICTION

The decision of the Sixth Circuit from which petitioner seeks a writ of certiorari was filed on November 9, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The court of appeals was vested with jurisdiction over the appeal from the United States Tax Court pursuant to 26 U.S.C. § 7482(a). The United States Tax Court was vested with jurisdiction in this case pursuant to 26 U.S.C. §§ 6213(a), 6214(a) and 7442.

STATUTORY AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the statutory and other provisions involved in this case is set out in the appendix beginning at App. 73a.

STATEMENT OF THE CASE

On May 10, 2004, Respondent Commissioner of Internal Revenue issued a notice of deficiency against Petitioner Estate of Eleanor R. Gerson ("Gerson Estate") under 26 U.S.C. § 6212 for a claimed deficiency in payment of the federal "generation-skipping transfer tax" ("GST tax").

1. The Generation-Skipping Transfer Tax and the Administrative Regulations. The GST tax was imposed by Congress as part of the enactment of the Tax Reform Act of 1986 (the "1986 TRA"). See P.L. 99-514, § 1431, 100 Stat. 2717 (codified at 26 U.S.C. § 2601, *et seq.*).[1] The purpose of the GST tax "is to ensure that generation skipping transfers do not escape the estate tax, that is, that such transfers are taxed as if they were made from one generation to the next, and then to the next after that, instead of skipping a generation." *Simpson v. United States*, 183 F.3d 812, 813 (8th Cir. 1999).

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[1]A form of GST tax had been enacted a decade earlier as part of the Tax Reform Act of 1976, Pub.L. 94-455, § 2006, but was retroactively repealed by the 1986 TRA. See P.L. 99-514, § 1433(c)(1).

A GST tax is imposed on "every generation-skipping transfer" pursuant to 26 U.S.C. § 2601.[2] Such transfers, categorized as "taxable terminations," "taxable distributions," and "direct skips," 26 U.S.C. § 2612, occur when an interest in property passes to a "skip person," defined as "a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor" or a trust "if all interests in such trusts are held by skip persons . . . ." 26 U.S.C. § 2613.

Generally, the GST tax applies to any transfer made to a skip person after October 22, 1986, the date of the enactment of the 1986 TRA. Pub.L. 99-514, § 1433(a), 100 Stat. 2731. However, several exceptions were adopted by Congress that exempt GST taxes under certain trusts and wills, including the following:

> (2) EXCEPTIONS.—The amendments made by this part shall not apply to—
>
> (A) any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985. * * *

Pub.L. 99-514, § 1433(b)(2)(A), 100 Stat. 2731 (the "Effective Date Exception").[3]

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[2] The tax imposed is a flat rate tax equal to the maximum estate tax rate in effect at the time of the transfer, which rate is multiplied by a statutorily-defined "inclusion ratio." 26 U.S.C. §§ 2641 & 2642. The person liable for the tax is determined by whether the transfer is a "taxable distribution," a "taxable termination," or a "direct skip." 26 U.S.C. § 2603.

[3] The Effective Date Exception was amended in 1988 to add the parenthetical phrase "(or out of income attributable to

In March 1988, the Secretary of the Department of the Treasury (the "Secretary") began issuing temporary and proposed regulations governing the implementation of the new GST tax provisions, including the effective date rules contained in the 1986 TRA. See Temp. Treas. Reg. 26.2601-1T, 53 Fed. Reg. 8441 (March 15, 1988). Final regulations were published on December 27, 1995. T.D. 8644, 60 Fed. Reg. 66,903 (Dec. 27, 1995). These regulations included the following provision with respect to the Effective Date Exception:

> (b) Exceptions—(1) Irrevocable trusts—(i) In general. The provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in section 2652(b)) that was irrevocable on September 25, 1985. The rule of the preceding sentence does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985. See paragraph (b)(1)(iv) of this section for rules for determining the portion of the trust that is subject to the provisions of chapter 13.

Treas. Reg. § 26.2601-1(b)(1)(i) (as finalized by T.D. 8644, 60 Fed. Reg. 66,903 (Dec. 27, 1995)).

In July 1999, the United States Court of Appeals for the Eighth Circuit issued its opinion in *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999). At issue in that case was whether a GST resulting from the exercise of a general power of appointment granted to a woman under her deceased spouse's testamentary trust, fell within the terms of the Effective

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corpus so added)" at the end of the provision. Pub.L. 100-647, § 1014(h), 102 Stat. 3567.

Date Exception. The testamentary trust had become irrevocable in 1966 upon the death of her husband. The woman exercised the general power of appointment granted her under the trust in her will, which became effective upon her death in 1993. The government asserted that the woman's exercise of the general power of appointment under the irrevocable trust did not fall within the Effective Date Exception.

The Eighth Circuit, however, rejected the Commissioner's interpretation of the Effective Date Exception as contrary to the statute. The court held that "the plain language of the [Effective Date Exception] . . . covers the transfer made by the exercise of her power of appointment, and there is no sufficient reason not to apply the plain language of the statute." *Simpson*, 183 F.3d at 813. The court found the government's contrary interpretation "untenable," *Simpson*, 183 F.3d at 814, and further explained:

> Which side is right about the purpose of the statute? The issue is easily resolved, we think, by consulting the most important evidence of a statute's purpose that is, its words. Recall the relevant clause: "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985." The government wants us to read the words, in effect, as though "which" modified "transfer." This is not a meaning that the words will bear. The antecedent of "which" is "trust," not "transfer." The relevant action which has to take place before September 25, 1985, is the creation of the trust, or rather its becoming irrevocable, not the occurrence of the generation-skipping transfer. We see no escape from the logic of this reasoning. In the present case, the

> trust became irrevocable before September 25, 1985. The transfer was made possible by the trust. The transfer was "under" the trust. The fact that the transfer occurred after September 25, 1985, and, indeed, that Mrs. Bryan, the transferor, could have avoided the GST tax by giving the property to someone other than her grandchildren, is not relevant. The point is that when the trust was created and became irrevocable Mrs. Bryan was given the authority, under the law as it then existed, to exercise her general power of appointment in favor of anyone at all, and to do so without subjecting the transfer to a GST tax, such a tax then being far in the future. This is the sort of reliance that the effective-date provision protects.

Simpson, 183 F.3d at 814-15.

On November 18, 1999, in direct reaction to this ruling, the Secretary proposed to amend Treas. Reg. § 26.2601-1(b)(1)(i) by adding the following language at the end of that regulation:

> Further, the rule in the first sentence of this paragraph (b)(1)(i) does not apply to a transfer of property pursuant to the exercise of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective and is not considered a transfer under a trust that was irrevocable on September 25, 1985. See paragraph (b)(1)(v)(B) of this section regarding the treatment of the release, exercise, or lapse of a power of appointment that will result in a constructive

addition to a trust. See §26.2652-1(a) for the definition of a transferor.

Notice of Proposed Rulemaking, REG-103841-99, 1999-2 C.B. 639, 64 Fed. Reg. 62,997 (Nov. 18, 1999). The amendment was published as part of the final regulations on December 20, 2000, retroactively effective to November 18, 1999, T.D. 8912, 65 Fed. Reg. 79,738 (Dec. 20, 2000), and is now found at 26 C.F.R. § 26.2601-1(b)(1)(i).[4] On February 28, 2000, the Internal Revenue Service issued 2000-9 I.R.B. 711, 2000 WL 33910971, advising taxpayers that "[t]he Commissioner NONACQUIESCES in the" *Simpson* decision.

2. The Commissioner's determination that the Gerson Estate was liable for the GST tax. Notwithstanding the Effective Date Exception, and the *Simpson* and *Bachler* decisions, the Commissioner determined that the Gerson Estate was liable for the payment of the GST tax. The Commissioner made that determination under the following factual circumstances. Eleanor R. Gerson ("Eleanor") was married to Benjamin S. Gerson ("Benjamin") from 1938 until his death in 1973. They had four children and five grandchildren. More than four years before his death, Benjamin, as grantor, executed a revocable trust agreement (the "Benjamin Gerson Trust"). Upon Benjamin's death, the trust, as amended, became irrevocable.

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[4] Following the adoption of the regulation, the United States Court of Appeals for the Ninth Circuit issued its decision in *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002), in which it held, like the Eighth Circuit in *Simpson*, *supra*, that the statutory Effective Date Exception was plain and unambiguous and that it applied in a factual situation virtually identical to the ones in *Simpson* and the present case.

Article III, Paragraph A of the Benjamin Gerson Trust, as amended, provided that, if Eleanor survived Benjamin, the trust corpus was to be divided into three trusts, designated Trusts A, B and C. The property to be allocated to Trust A was defined as:

> [A]n amount which when added to the value for federal estate tax purposes of all items in my gross estate which qualify for the estate tax marital deduction and which pass or have passed to my said wife under other provisions hereof . . . or otherwise than under this Trust Agreement, will equal twenty percent (20%) of my gross estate.

Article III, Paragraph B, of the Benjamin Gerson Trust provided for the distribution of income and principal of Trust A for the "sole benefit" of Eleanor. It further provided that, upon her death, Eleanor had "an unlimited testamentary power of appointment" with regard to the balance remaining in Trust A. If Eleanor died "without having fully and effectively exercised" this general power of appointment, then the remaining corpus of Trust A was to be transferred to and disposed of as part of Trust C.

Eleanor lived for more than 27 years after Benjamin's death, dying on October 20, 2000. She was survived by her four children and five grandchildren. At the time of her death, the corpus of Trust A of the Benjamin Gerson Trust had a value of $6,244,627.16, and no additions had been made to the corpus of Trust A after September 25, 1985. Eleanor exercised her general power of appointment under the Benjamin Gerson Trust in her will, allocating the balance of Trust A to National City Bank as Trustee of a trust "for the benefit of [her] grandchildren and more remote descendants" ("the Eleanor Gerson Trust").

Allan D. Kleinman ("Kleinman") was appointed the executor of Eleanor's estate on November 13, 2000. On July 21, 2001, Kleinman timely filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (the "Estate's Return"), reporting a gross estate in the amount of $22,054,002.79, and federal estate taxes due in the amount of $7,168,531.02. The latter amount was remitted with the Gerson Estate's Return. Kleinman also filed a Form 8275-R, Regulation Disclosure Statement, serving notice that the Gerson Estate was taking a position that was contrary to Treas. Reg. § 26.2601-1(b)(1)(i) in connection with the assets transferred from Trust A of the Benjamin Gerson Trust to the Eleanor Gerson Trust pursuant to Eleanor's exercise of the general power of appointment granted under Trust A. Nearly three years later, the Commissioner issued a notice of deficiency claiming that the Gerson Estate was responsible for the payment of $1,144,465 for the GST tax.

On July 29, 2004, Petitioner timely petitioned the United States Tax Court for redetermination of the alleged deficiency pursuant to 26 U.S.C. § 6213(a). The Commissioner answered, and the case was submitted to the court for decision on stipulated facts.

3. The decisions below. On October 31, 2006, the Tax Court, by a ten-to-five vote, entered its decision in favor of Respondent finding Petitioner liable for a deficiency in federal generation-skipping transfer tax in the amount of $1,144,465. The decision resulted in six different opinions: the majority opinion, three concurring opinions, and two dissenting opinions, with one judge concurring in the result only. Only seven of the fifteen judges participating in the case joined

in the court's Opinion, holding that Treas. Reg. § 26.2601-1(b)(1)(i) is a "reasonable and valid interpretation" of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub.L. 99-514. The five dissenting judges concluded that the regulation was contrary to the "plain and unambiguous" language of the statute. *Estate of Gerson v. Commissioner of Internal Revenue*, 127 T.C. 139 (2006), App. at 13a.

Petitioner thereafter timely appealed the Tax Court's decision to the United States Court of Appeals for the Sixth Circuit. On November 9, 2007, that court unanimously affirmed the decision of the Tax Court. *Estate of Gerson v. Commissioner of Internal Revenue*, 507 F.3d 435 (2007). In its decision, the court determined that § 1433(b) was ambiguous, and that the Commissioner had "reasonably construed the statute," *Estate of Gerson*, 507 F.3d at 441, App. at 11a, through the promulgation of Treas. Reg. § 26.2601-1(b)(1)(i).

THE REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Sixth Circuit's decision in this case is at odds with the decisions of the United States Courts of Appeals for the Eighth and Ninth Circuits in *Simpson* and *Bachler*, respectively. In those cases, the courts concluded that the Effective Date Exception was clear and unambiguous and excepted the taxes imposed upon the Gerson Estate herein. As observed by the court in *Bachler*, "[t]he statute creating the exception, carefully drafted to exclude additions to the trust corpus, makes no exclusion for the exercise of a general power of appointment." *Bachler*, 281 F.3d at 1080. The Sixth Circuit's decision has the effect of rendering the Gerson Estate liable for pay-

ment of the GST tax based solely upon the residence of Eleanor or the administrator of her estate, while transfers made by other taxpayers—particularly those domiciled in territory encompassing the Eighth and Ninth Circuits—are properly excepted.

Petitioner maintains that, contrary to the Sixth Circuit's decision herein, the imposition of GST tax liability is directly contrary to the plain and straightforward language of the Effective Date Exception, and that the Secretary's regulatory interpretation of that exception, therefore, reflects an impermissible construction of the statute. Accordingly, the regulation is invalid, and the Commissioner cannot premise the notice of deficiency on that regulation.

Moreover, this case raises important issues under this Court's ruling in *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), wherein the Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. at 982 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 842 (1984)). As noted above and as discussed in greater detail below, both the Eighth and Ninth Circuits have concluded that the Effective Date Exception is clear and unambiguous. The Eighth Circuit's decision preceded the promulgation of the regulation at issue herein, and it—like the Ninth Circuit would later do—construed the words of the statute as applying to transfers resulting from the exercise of a general power of appointment granted under a trust that was irrevocable prior to September 25, 1985. It was only

after the Eighth Circuit's decision was issued—indeed, in direct reaction to it—that the Secretary promulgated the regulation at issue in an attempt to negate the court's holding. Thus, under this Court's decision in *Brand X Internet Servs.*, the Commissioner's interpretation of the statutory Effective Date Exception, as reflected in Treas. Reg. § 26.2601-1(b)(1)(i), is not entitled to deferential review.

The Sixth Circuit herein evaded the application of the *Brand X Internet Servs.* rule by simply concluding that it was not bound by its sister circuits' holding that the statute was unambiguous. Finding an ambiguity where none otherwise existed, the court deferred to the regulation as a reasonable administrative interpretation entitled to the full level of *Chevron* deference. Petitioner maintains that no ambiguity in the Effective Date Exception exists, and that *the Commissioner* was, therefore, bound by the prior judicial construction of the statute. The Treasury regulation must, therefore, fall.

Treas. Reg. § 26.2601-1(b)(1)(i) impermissibly purports to re-write the statute and to override the judicial construction of the statute's plain language to the extent it excludes transfers such as the one herein from the Effective Date Exception. Contrary to the decisions below, the regulation cannot be harmonized with the statute's plain language, origin and purpose and does not reflect a reasonable exercise of regulatory authority. The Court should therefore grant a writ of certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

II. THE EFFECTIVE DATE EXCEPTION TO THE GENERATION-SKIPPING TRANSFER TAX CONTAINED IN SECTION 1433(b) IS UNAMBIGUOUS, AND ANY ADMINISTRATIVE REGULATION CONTRARY TO THAT PLAIN AND UNAMBIGUOUS STATUTE MUST FALL.

With its decision, the Sixth Circuit created a conflict with decisions of the United States Courts of Appeals for the Eighth and Ninth Circuits. In doing so, the court below has elevated a simple case involving a plainly and unambiguously worded statute into one that demands this Court's review. Allowing the Sixth Circuit's decision to stand will subject taxpayers throughout the country to differing rules and levels of taxation based solely upon their geographic location. Accordingly, the Court should grant the requested writ of certiorari and reverse the decision of the court of appeals herein.

Both the Tax Court and the Sixth Circuit below devoted a great deal of their decisions in this case to discussing the appropriate level of deference to be accorded Treasury Regulations issued pursuant to 26 U.S.C. § 7805(a) (giving the Secretary the general authority to issue interpretive regulations). See *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (Treasury Regulations adopted pursuant to 26 U.S.C. § 7805(a) are "interpretive" and owed less deference than regulations issued under a specific Congressional grant of authority). Ultimately, the Sixth Circuit ruled that interpretive Treasury Regulations are entitled to full "*Chevron* deference," see *Estate of Gerson*, 507 F.3d at 438 (citing *Chevron U.S.A., Inc.*, 467 U.S. at 842). Petitioner maintains however, that Treas. Reg. § 26.2601-1(b)(1)(i), 26

C.F.R. § 26.2601-1(b)(1)(i), is entitled to no deference as it is contrary to the plain and unambiguous meaning of the statutory Effective Date Exception.

The Court has long held that:

> in interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted). Accordingly, the first step in all statutory construction cases "'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

The language used by Congress establishing the statutory Effective Date Exception is clear and unambiguous. It provides, in relevant part, that the GST tax will not apply to "any generation-skipping transfer under a trust which was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985. . . ." Pub.L. 99-514, § 1433(b)(2)(A), 100 Stat. 2731. As the Eighth Circuit stated, "[t]he words of Section 1433(b)(2)(A) are clear, at least to us, and we see no reason not to apply them. The words make it clear that Congress intended to protect the reliance of creators of trusts on the law as it existed at the time the trusts became irrevocable." *Simpson*, 183 F.3d at 816.

Absent ambiguity in the statutory language, no regulatory interpretation is either required or permitted. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.*, 467 U.S. at 842-43.

The Sixth Circuit herein avoided the application of this rule by simply finding that the preposition "under," as used in the phrase "under a trust" within the Effective Date Exception, was ambiguous. *Estate of Gerson*, 507 F.3d at 441; App. at 10a. The court based this holding primarily upon the fact the word "under" was not defined in the statute. *Id.*[5] This conclusion cannot withstand scrutiny. See *Simpson*, 183 F.3d at 816 ("It is true that the ingenuity of lawyers can usually scrape up some tag end of ambiguity on which to hang a policy hat. But Judges are obliged, unless there is a substantial uncertainty as to the meaning of the words of a statute, to apply the statute as written, unless the words are simply nonsense, or self-contradictory, or something of that kind. This is not such a case.").

Petitioner is unaware of any precedent holding that a word or phrase used in a statute is ambiguous merely because Congress chose not to define that term. See *Estate of Gerson*, 127 T.C. at 169 n.2, App. at 60a (Laro, J., dissenting). In the absence of a statutory definition, courts must "construe a statutory term in accordance with its ordinary and natural

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[5] The Tax Court similarly premised its finding of ambiguity upon the fact the term "transfer under a trust" was not defined in the statute. See *Estate of Gerson*, 127 T.C. at 154, App. at 35a-36a.

meaning." *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). This is particularly true in the case of "nontechnical words and phrases." *Smith v. United States*, 508 U.S. 223, 228 (1993) (citation omitted).

Both the *Simpson* and *Bachler* courts found that the application of the "ordinary and natural meaning" of the phrase "under a trust" requires the conclusion that a GST resulting from the exercise of a general power of appointment granted under a trust that was irrevocable on September 25, 1985, falls within the plain wording of the Effective Date Exception. *Simpson*, 183 F.3d at 816 ("[T]he transfer at issue in this case took place under a trust which was irrevocable on September 25, 1985. The GST tax therefore does not apply."); *Bachler*, 281 F.3d at 1080 ("Acting under the trust created by her husband, [the decedent] fitted her gifts to her grandchildren so that they fell within the exact wording of § 1433(b)(2)(A)."). The Sixth Circuit's finding of ambiguity in a word that must be given its plain and ordinary meaning cannot, therefore, stand.

Application of these principles leads to the inescapable conclusion that Treasury Regulation § 26.2601-1(b)(1)(i)—to the extent it purports to exclude from the statutory Effective Date Exception transfers accomplished by the exercise of a general power of appointment granted under a trust that was irrevocable on September 25, 1985—is invalid. See *Koshland v. Helvering*, 298 U.S. 441, 447 (1936) (Where a statute is "unambiguous, and its directions specific, there is no power to amend it by regulation."). No such exclusion from the exception is stated or even hinted at in the plain language used by Congress. The statute was "carefully drafted" to provide for only one exclu-

sion, applicable solely in those instances where a GST was "made out of corpus added to the trust after" the specified date. *Bachler*, 281 F.3d at 1080. No other exclusion can or should be inferred or implied. The Sixth Circuit, therefore, erred by concluding that the Effective Date Exception was ambiguous and according the interpretive regulation the utmost deference.

In upholding the regulation despite the statute's otherwise plain meaning, the Tax Court resorted to the history of the GST tax in general to support its conclusion that the regulatory interpretation "harmonizes with the origin and purpose of" the statute. *Estate of Gerson*, 127 T.C. at 156, App. at 38a. Indeed, the Tax Court expressly rejected the notion that it was bound by the plain meaning of the statute. See *Estate of Gerson*, 127 T.C. at 155, App. at 36a ("[W]e do not evaluate the validity of section 26.2601-1(b)(1)(i), GST Tax Regs., by examining the plain language of TRA 1986 section 1433(b)(2)(A) in a vacuum—we also are obliged to consider the origin and purpose of the statute."). The Sixth Circuit reached a similar conclusion. *Estate of Gerson*, 507 F.3d at 441, App. at 11a ("[T]he regulation conforms the grandfather clause to other elements of the tax scheme.").

In essence, both courts below resorted to what they believed was established by legislative history in order "to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994). It is only, however, "the most extraordinary showing of contrary intentions from" legislative history that would warrant or justify a departure from the plain meaning of statutory language. *Garcia v. United States*,

469 U.S. 70, 75 (1984). Indeed, the Court has stated that:

> [t]he "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of problems Congress is called upon to address and the dynamics of legislative action . . . . Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of Fed. Reserve Sys. v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986) (rejecting Federal Reserve Board's attempt to expand definition of regulated institutions beyond statutory scope based on the "policy of the legislation as a whole"). It may well be, as the Tax Court notes, that in enacting the GST tax Congress had the broad purpose of imposing a uniform tax in a manner that minimized the exceptions thereto. *Estate of Gerson*, 127 T.C. at 155-56, App. at 38a. But the legislative history, even if it supported the Commissioner's interpretation, simply cannot override the plain language of the statutory Effective Date Exception itself.[6]

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[6] Contrary to the Tax Court's view, the legislative history of the Effective Date Exception does not serve to justify the interpretation embodied in Treas. Reg. § 26.2601-1(b)(1)(i). A Congressional staff report discussing the proposed exception supports the plain meaning attributed to the exception by the Eighth and Ninth Circuits: "The amended GST tax would apply to transfers after the date of enactment, subject to the following exceptions: * * * (2) *Transfers from trusts that were irrevocable*

In the final analysis, Treas. Reg. § 26.2601-1(b)(1)(i) is not capable of being "harmonized" with the plain language of the Effective Date Exception. The regulation, as amended in 1999, provides that the Effective Date Exception "does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12" because "the transfer is made by the person holding the power at the time the exercise, release or lapse of the power becomes effective," and, therefore, "is not considered a transfer under a trust that was irrevocable on September 25, 1985." The statutory Effective Date Exception, however, explicitly applies to *any* GST under a trust, without restriction or reference to how the transfer may be treated under other provisions of chapter 13 or the Internal Revenue Code generally. Treas. Reg. § 26.2601-1(b)(1)(i) effectively but impermissibly re-writes the plain language of the Effective Date Exception, adding an exclusion that is not expressed in and cannot be implied from that language. The regulation simply cannot withstand judicial scrutiny. The Court should, therefore, grant the requested writ

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before September 26, 1985, would be exempt to the extent that the transfers are not attributable to additions to the trust corpus after that date. Staff of the Joint Comm. on Taxation, 99th Cong., Tax Reform Proposals in Connection with Committee on Ways and Means Markup, at 136 (Sept. 26, 1985) (emphasis added). See also H.R. Rep. No. 99-426, at 828 (1985); H.R. Conf. Rep. No. 99-841, at II-775 (1986); Staff of the Joint Comm. on Taxation, 100th Cong., General Explanation of the Tax Reform Act of 1986, at 1267 (1987). These reports show no intent on the part of Congress to limit the scope of the Effective Date Exception in a manner at odds with the plain meaning of the exception itself.

and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

III. TREAS. REG. § 26.2601-1(b)(1)(i) REPRESENTS AN IMPERMISSIBLE ATTEMPT TO OVERRIDE A PRIOR JUDICIAL CONSTRUCTION OF THE STATUTORY EFFECTIVE DATE EXCEPTION BASED UPON THE UNAMBIGUOUS WORDS OF THE STATUTE ITSELF.

As noted above, deference is ordinarily accorded to the Secretary's regulations adopted pursuant to 26 U.S.C. § 7805(a), so long as such regulations "'implement[ ] the congressional mandate in some reasonable manner.'" *Vogel Fertilizer Co.*, 455 U.S. at 24 (citation omitted). However, no deference can be afforded a regulatory interpretation of a statute when it directly contradicts a prior judicial construction and thereby seeks to usurp and override the authority of the federal courts.

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron U.S.A., Inc., 467 U.S. at 843 n.9. See also *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (Deference to an agency's "statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.").

Consistent with these principles, a court's prior construction of a statute trumps an agency construction which may otherwise be entitled to *Chevron* deference "if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X Internet Servs.*, 545 U.S. at 982. See also *Koshland*, 298 U.S. at 447; *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed.") (emphasis in original).

Following the decision in *Simpson*, *supra*, the Secretary was foreclosed from issuing an interpretive regulation that directly contradicted the Eighth Circuit's "plain language" analysis and holding. Through the amendment of Treas. Reg. § 26.2601-1(b)(1)(i) less than four months after Simpson was decided,[7] the Secretary sought to reverse a prior judicial construction of the Effective Date Exception that was undeniably based upon the plain wording of the statute itself. See *Simpson*, 183 F.3d at 816 ("The words of Section 1433(b)(2)(A) are clear . . . and

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[7] The Commissioner does not dispute that the amendment, promulgated thirteen years after the 1986 version of the GST Tax was enacted, was adopted in direct response to *Simpson*. See Notice of Proposed Rulemaking, REG-103841-99, 1999-2 C.B. 639, 64 Fed. Reg. 62,997 (Nov. 18, 1999). The Tax Court acknowledged as much: "We note at the outset that the Secretary promulgated section 26.2601-1(b)(1)(i), GST Tax Regs., after the Commissioner received an adverse decision from the Eighth Circuit in *Simpson*." *Estate of Gerson*, 127 T.C. at 152, App. at 33a.

we see no reason not to apply them.").[8] Accordingly, the Commissioner's interpretation of the statutory Effective Date Exception as reflected in the challenged regulation is not entitled to deferential review—the regulation is, in fact, trumped by a prior judicial construction holding that the agency's interpretation was "unambiguously foreclose[d]" by the statute's plain language. *Brand X Internet Servs.*, 545 U.S. at 982-83.

Nevertheless, the Sixth Circuit herein deferred to the Commissioner's regulatory interpretation of the Effective Date Exception, finding it to be "reasonable" under the second step of the *Chevron* test. *Estate of Gerson*, 507 F.3d at 441, App. at 11a. It dismissed the application of the rule articulated in *Brand X Internet Servs.* by simply concluding that it was not bound by its sister circuits' holding that the statute was unambiguous and precluded the interpretation urged by the Commissioner and subsequently adopted in regulation by the Secretary. *Id.* at 440 n.2, App. at 9a.[9] Thus, the Sixth Circuit's ruling presents squarely for decision by this Court whether a regulation

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[8] As noted above, in February, 2000, the Internal Revenue Service issued 2000-9 I.R.B. 711, 2000 WL 33910971, advising taxpayers that "[t]he Commissioner NONACQUIESCES in the" *Simpson* decision, in effect announcing that he would not consider himself bound by the judicial determination that the statute was plain and unambiguous.

[9] The Sixth Circuit characterized Petitioner's argument as being that *Brand X Internet Servs.* "requires us to follow the Eighth Circuit's 'plain language' determination." *Id.* This is incorrect. Rather, Petitioner contended below and asserts here that the rule announced in *Brand X Internet Servs.* precluded the application of *Chevron* deference and that the promulgation of the regulation by the Secretary was therefore invalid in light of the holding in *Simpson*.

promulgated in contradiction to a prior judicial decision predicated on the plain language of a statute is entitled to *Chevron* deference upon subsequent judicial review.

The need for the Court to take up this question is demonstrated by the decisions below. Having been told by a federal court of appeals exactly what the statute unambiguously means—and having not sought this Court's review of that decision—the Secretary had no authority to promulgate a regulation adopting a contrary interpretation. Yet, both the Tax Court and the Sixth Circuit concluded that the regulation issued by the Secretary in derogation of *Simpson* was entitled to deferential review and constituted a "reasonable" interpretation of the statute. In essence, they found that, because they themselves were not bound by the Eighth Circuit's holding, neither was the Secretary nor the Commissioner.

Such reasoning clearly negates and renders meaningless the rule articulated by the Court in *Brand X Internet Servs.* It permits the Secretary to promulgate and the Commissioner to enforce a regulation directly contrary to a judicial determination that explicitly held that the words of the statute "unambiguously require[d] the court's construction." *Brand X Internet Servs.*, 545 U.S. at 985. This goes well beyond the administrative "gap-filling" authority recognized in *Chevron* and reaffirmed in *Brand X Internet Servs.* It effectively removes from the judicial branch its constitutionally-charged power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and transfers it to the executive branch.

This result is evident in the Sixth Circuit's reasoning. The court found an ambiguity in the mean-

ing of the preposition "under" as used in the Effective Date Exception—not through the use of any textual analysis or by employing any canon of statutory construction—but because "both parties [the Estate and the Commissioner] offer plausible, contrary interpretations." *Estate of Gerson*, 507 F.3d at 441, App. at 11a. In effect, the court found that the Secretary created an "ambiguity" simply by offering an alternative interpretation in regulation, even where a sister appellate court, which examined the actual words contained in the Effective Date Exception, previously concluded that the plain and unambiguous language of the statute foreclosed that construction.[10] Such

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[10]The Sixth Circuit also premised its finding of ambiguity, in part, upon the decision of the United States Court of Appeals for the Second Circuit in *E. Norman Peterson Marital Trust v. Commissioner of Internal Revenue*, 78 F.3d 795 (2d Cir. 1996). The Second Circuit's decision in *Peterson* does not, however, support a finding of ambiguity. Indeed, the *Peterson* court did not even address the same issue that was before the Eighth Circuit in *Simpson*, the Ninth Circuit in *Bachler*, or the Sixth Circuit herein. As the Court in *Bachler* noted:

> In this case Peterson died in 1974, leaving his wife the life beneficiary of a trust with a general testamentary power of appointment and a provision that, if she did not exercise the power, the remainder was to go to the grandchildren. She died in 1987, not having exercised the power. Seeking to sustain the GST on the transfer to the grandchildren, the government relied on Temp. Treas. Reg. § § 26.2601-1(b)(1)(v)(A), which defined the lapse of a general power of appointment as an addition of corpus to the trust. Judge Calabresi in a thoughtful opinion sustained the regulation as a reasonable interpretation of the statute so that, by the statute's own terms, the transfer did not qualify as an exception. *But that case is not ours. Here nothing was added to the corpus.*

Bachler, 281 F.3d at 1079 (emphasis added). See also *Simpson*, 183 F.3d at 815 ("The question in the *Peterson* case was not whether the transfer effected by Mrs. Peterson's

reasoning turns *Chevron* analysis on its head: because the challenged regulation offers a plausible alternative interpretation of the statute, the statute must be ambiguous and, therefore, the regulation *creating* the "ambiguity" is subject to deferential review. The task of statutory construction is fully ceded to the administrative agency.

In truth, there is nothing "plausible" or "reasonable" about the interpretation of the Effective Date Exception reflected in Treas. Reg. § 26.2601-1(b)(1)(i). The regulation purports to insert into the statute an "identity of transferor" limitation on the Exception's application that is not found anywhere in the statute's text or referred to in its legislative history. Nothing in the language of the statute indicates that Congress intended to limit its applicability based on who the "transferor" of property is deemed to be for estate or gift tax purposes under chapters 11 and 12 of the Code. Rather, the Effective Date Exception expressly states that it applies to *any* transfer under a trust which was irrevocable as of September 25, 1985, without reference to how the transfer may

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choosing not to exercise her power was 'under' the trust, but rather whether the transfer had been made 'out of corpus added to the trust after September 25, 1985.'"). *Bachler, Simpson,* and this case do not involve constructive additions to trusts under any Treasury Regulation. Indeed, the Commissioner stipulated herein that no additions were made to the corpus of the Benjamin Gerson Trust after September 25, 1985. Consequently, the *Peterson* decision is completely devoid of any analysis of the exception from application of the GST tax provided for in § 1433(b)(2)(A), and it does not support the Sixth Circuit's observation that "the second clause [of § 1433(b)(2)(A)] brings to this court a question that divides three of our sister circuits and the Tax Court below." *Estate of Gerson,* 507 F.3d at 439, App. at 7a.

otherwise be treated under other Code sections. Only by ignoring what the Effective Date Exception actually says was the Sixth Circuit able to find that the regulation represents a "plausible" interpretation of that statute.

Plainly, the import and application of *Brand X Internet Servs.* requires clarification and explication by the Court. Indeed, the Sixth Circuit itself acknowledged that "[t]he full significance of *Brand X* remains unclear . . . ." *Estate of Gerson*, 507 F.3d at 440 n.2, App. at 9a. This case provides the appropriate circumstances to provide the needed clarification. Accordingly, this Court should grant the writ and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

CONCLUSION

Pursuant to the plain and unambiguous language of the Effective Date Exception, the transfer of the property held in Trust A of the Benjamin Gerson Trust by reason of the exercise by Eleanor of the general power of appointment granted her under that trust is not subject to the GST tax under 26 U.S.C. § 2601. The Court should, therefore, grant the requested writ of certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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